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October 22, 2001

David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

Re: *Docket to Determine the Compliance of BellSouth Telecommunications Inc.'s
Operations Support Systems with State and Federal Regulations*
Docket No: 01-00362


Dear David:

Attached is AT&T Communications of the South Central States, Inc., TCG MidSouth, Inc., and the Southeastern Competitive Carriers Association (collectively the "Intervenors") Motion for Summary Finding in the above referenced docket.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:


Henry Walker

HW/cw

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

In re:)
Docket to Determine the Compliance)
of BellSouth Telecommunications, Inc.'s)
Operations Support Systems with State)
and Federal Regulations)

Docket No.: 01-00362

**MOTION OF AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC.,
TCG MIDSOUTH, INC. AND THE SOUTHEASTERN COMPETITIVE CARRIERS
ASSOCIATION FOR SUMMARY FINDING**

AT&T Communications of the South Central States, Inc., TCG MidSouth, Inc., (collectively "AT&T") and the Southeastern Competitive Carriers Association ("SECCA") hereby request that the Tennessee Regulatory Authority ("TRA" or "Authority") find that BellSouth Telecommunications, Inc. ("BellSouth") cannot establish that the OSS testing conducted in Georgia or Florida is sufficiently reliable to inform the Authority's decision-making process unless BellSouth can ensure that the experts involved in conducting and preparing the report on the Georgia OSS Test, KPMG Consulting, Inc. ("KCI") and Hewlett Packard ("HP"), participate in written and deposition discovery in accordance with the Authority's Order Establishing Issues and Procedural Schedule, issued September 13, 2001 ("September 13th Order"). BellSouth claims that the results of the Georgia test are sufficiently reliable for use in Tennessee. If BellSouth cannot bring about its experts' compliance with the Competitive Local Exchange Carriers' ("CLECs") discovery, BellSouth cannot substantiate its claim.

ARGUMENT

Part of the purpose of this docket is to assess the reliability of the data and test results derived from third-party OSS testing in other BellSouth states. BellSouth claims that the Georgia test is reliable and should be the basis for the Authority's analysis of BellSouth's OSS. Although the Authority initially contemplated retaining KCI to assist in investigating BellSouth's reliability claim, this option met with resistance from both BellSouth and KCI, and the Authority decided instead to include the reliability issue as part of Phase II of a contested case in this docket. Accordingly, the CLECs have stepped into the role of investigating BellSouth's claim.

As the Authority anticipated, the CLECs' investigative role involved serving written discovery upon and noticing depositions of BellSouth's experts, including KCI and HP.¹ KCI and HP, however, have not cooperated with this discovery. This failure to cooperate has effectively precluded the CLECs from providing the Authority with the information it needs to conduct a comprehensive hearing and reach a well-supported result. Accordingly, AT&T and SECCA request that the Authority make a summary finding that BellSouth cannot establish its reliability claim unless BellSouth can secure the full participation of KCI and HP in discovery.

I. THE CLECS HAVE STEPPED INTO THE ROLE OF INVESTIGATING BELL SOUTH'S RELIABILITY CLAIM

The Authority created the instant docket "to determine whether existing data or test results derived from OSS testing in other states is reliable and applicable to Tennessee and, in

¹ For the purposes of this motion, AT&T uses the term discovery to include both written discovery and deposition of experts.

those instances where reliance on such testing is inappropriate, to conduct necessary testing.” (Order Approving First Report and Recommendation of the Pre-Hearing Officer, dated July 27, 2001 (“July 27 Order”) at 2-3.) The Authority initially determined that an independent third-party review would be helpful in its evaluation of the regionality and reliability questions. In making this determination, the Authority considered the pre-hearing officer’s concerns regarding inconsistencies in BellSouth’s data request response filed on January 29, 2001, as well as information indicating that the testing in Georgia and Florida is not consistent. In light of the need for an even-handed investigation and presentation of the facts required for the Authority to conduct a thorough, well-informed evaluation, AT&T, SECCA and other competitive local exchange carriers concurred in the Authority’s decision to retain a third-party consultant. (*See* AT&T’s letter of May 11, 2001; Comments of the Southeastern Competitive Carriers Association, filed May 11, 2001.) BellSouth opposed retention of a third-party consultant. (*See* Transcript of October 9, 2001 Status Conference at 41:7-12.)

Subsequent diligent efforts to implement the Authority’s decision encountered unforeseen obstacles. Specifically, what appeared to be a benefit that would improve the efficiency of the independent evaluation – the familiarity of BellSouth’s expert, KCI, with the ongoing tests in Georgia and Florida – proved to be a handicap, because KCI was unwilling to provide critical opinions related to the scope, conduct, and distinguishing characteristics of its work in Georgia and Florida.

On August 21, 2001, the Authority determined that it would not retain a third-party consultant to investigate the applicability of OSS testing in Georgia and in Florida to evaluate BellSouth’s performance in Tennessee. (*See* September 13th Order at 4.) The Authority chose instead to hold a contested case and charged CLECs with the responsibility of stepping into the

role of investigator. (*See* September 13th Order at 4; Tr. of Oct. 9, 2001 Status Conf. at 70:10-12.)

The Authority gave structure to the CLECs' investigation by dividing the issues to be considered into two phases and setting a date for the hearing on the first phase. The Authority's schedule included deadlines for written and deposition discovery. The deposition discovery schedule was modified at the October 9, 2001 Status Conference.

In compliance with the Authority's schedule, the CLECs served discovery requests and a proposed list of persons to be deposed upon BellSouth, KCI, HP, PWC and Cap Gemini Ernst & Young.² KCI and HP failed to make timely objections to the CLECs' written discovery, and the Authority expected they would comply. "[S]ince they didn't object, I have to assume they're going to deliver." (Tr. at 56:23-25.) Nonetheless, KCI has not complied with discovery,³ and counsel for HP sent a letter to the CLECs on October 10, 2001, the day after the Status Conference, indicating that HP does not consider itself subject to the CLECs' discovery and will not comply. *See* Letter from Kimberley L. Myers to Henry Walker and Sylvia Anderson, October 10, 2001, attached as Exhibit A.

² As the Authority is aware, BellSouth filed objections to certain of the CLECs' requests. With the Authority's assistance, the CLECs and BellSouth have worked through a number of issues and discovery is proceeding. In addition, AT&T has negotiated agreements regarding discovery with PWC and Cap Gemini Ernst & Young.

³ Although KCI has not yet affirmatively refused to comply, KCI's failure to provide timely objections or responses demonstrates that KCI is not cooperating with the discovery process. Moreover, AT&T's experience with KCI in other jurisdictions has shown that KCI has ignored discovery deadlines, thus introducing delay, and KCI has resisted compliance until threatened with adverse consequences to BellSouth, such as the striking of BellSouth's third-party test testimony. *See, e.g.*, AT&T's Motion to Compel or, in the Alternative, to Strike Evidence, filed in North Carolina Utilities Commission Docket No. P-55, Sub 1022, July 23, 2001.

BellSouth must make the experts upon which it relies available for written and deposition discovery. During the October 9, 2001 Status Conference, the Authority stressed to BellSouth that the burden of establishing its claims rests upon BellSouth. (*See* Tr. of Oct. 9, 2001 Status Conf. at 49:8-16.) Director Greer instructed BellSouth to make its contractors cooperate with the CLECs' discovery: "As it relates to KPMG and to Pricewaterhouse and Hewlett Packard, all of these people were under your contract. You better have them available. They want to depose them. KPMG was hired by you and is under direct contract with you and so was Pricewaterhouse and so was Hewlett Packard." (Tr. at 46:24-47:4.) In addition, Director Greer told counsel for AT&T "all three of those parties are under contract to BellSouth and it's their responsibility." (Tr. at 55:6-7.)

In keeping with the Authority's direction, by letter of October 15, 2001, AT&T reiterated its position that AT&T expects BellSouth to make available for deposition certain of its contractor experts, including some employed by KCI and HP. *See* Letter from Sylvia Anderson to Fred McCallum, October 15, 2001, attached as Exhibit B. BellSouth's October 18, 2001 response reflects the position it stated at the October 9, 2001 Status Conference: that KCI and HP are independently represented and BellSouth is unable to represent what they will do. (Tr. of Oct. 9, 2001 Status Conf. at 47:6-11.) In the response, counsel for BellSouth claims that it has "urged cooperation with AT&T's discovery requests." *See* Letter from Fred McCallum to Sylvia Anderson, October 18, 2001, attached as Exhibit C. BellSouth also advises AT&T that while BellSouth counsel will be available to discuss scheduling of depositions of BellSouth employees, AT&T should contact KCI and HP directly to schedule depositions of KCI and HP employees. *Id.* When AT&T contacted HP regarding scheduling the depositions, however, counsel for HP

refused to provide the requested deponents without a subpoena and denied knowledge of any contact from BellSouth about this discovery.

KCI and HP failed to assert timely objections to the CLECs' discovery. Nonetheless, the CLECs have been denied access to vital documents and deposition information concerning the third-party testing underlying the expert reports, which provide the basis for BellSouth's reliability claim. BellSouth should not be permitted to prevent the CLECs from performing a thorough analysis of the expert reports upon which it relies and from fulfilling the role assigned to the CLECs by the Authority.

II. THIS INVESTIGATION CANNOT PROCEED UNLESS KCI AND HP PARTICIPATE IN DISCOVERY

As AT&T explained more fully in its Motion for Discovery, filed September 4, 2001, discovery of information related to the expert reports on which BellSouth relies is vital to a complete analysis of BellSouth's reliability claim. Without access to this information, the CLECs cannot conduct a thorough investigation and the Authority will be unable to make a well-founded decision concerning the applicability of the third-party tests to Tennessee. The Authority should not be forced to reach a conclusion regarding the applicability of third-party testing in other states based only upon the limited information BellSouth is willing and able to provide. Moreover, the Authority should not rely on expert reports like the KCI/HP test unless its reliability has been established. Instead, the Authority should require BellSouth to ensure compliance with the CLECs' discovery, and if that compliance is not forthcoming, the Authority should find that BellSouth cannot establish its reliability claim.

As the Authority is aware, BellSouth urges the Authority to rely upon KCI's Georgia test final report as evidence of its OSS performance. (See Tr. at 110:11-12 "BellSouth has presented

a case and they're hanging their hat on the Georgia test.") One of the purposes of Phase II of this docket is to assess the reliability of that report, and such an assessment involves investigation into the test process and results which form the basis for the conclusions in the report. As KCI itself has indicated, KCI is the only entity capable of explaining the test process and results with any degree of authority.⁴ To the extent HP participated in the development and/or conduct of testing of BellSouth's OSS, HP's cooperation is also necessary, since HP is the only entity capable of explaining its participation with any authority. Although BellSouth has indicated that it is willing to offer BellSouth employees as witnesses to testify regarding the Georgia test, employees of the test subject simply cannot replace the actual tester and author of the expert report. The third-party test report therefore should not be permitted as evidence in this docket unless KCI and HP are subject to cross-examination on the test and report. Effective investigation and cross-examination requires full discovery relating to the test. If BellSouth cannot secure KCI's and HP's participation in discovery, the CLECs cannot properly fulfill their role and investigate the reliability of KCI's OSS tests.

BellSouth contracted with KCI and HP to produce expert reports upon which BellSouth relies. Presumably, this contractual relationship includes a measure of control over KCI and HP work papers and other documents. KCI and HP would surely provide BellSouth with copies of these materials if BellSouth so requested. In addition, BellSouth should be able to require its experts to defend in depositions the reports for which they were retained. The contractors'

⁴ For example, KCI explained to the Louisiana Public Service Commission that "[a]s the author of the Georgia 271 Test Final Reports, no other party can adequately represent and articulate the basis for KPMG Consulting's use of statistical analysis in such reports." Louisiana Public Service Authority, Docket No. U-22252-E, KPMG Consulting, Inc.'s Motion for Leave to Articulate Basis for Statistical Analysis in the Georgia 271 Test Final Reports, dated June 25, 2001, at p. 2.

refusal to participate in discovery has created an insurmountable obstacle to the CLECs' investigation of BellSouth's reliability claim.

CONCLUSION

BellSouth opposed retention of a third party to investigate its claim that the Georgia and Florida OSS tests are sufficiently reliable to be applicable in Tennessee. The CLECs have assumed the role of investigator, and they need discovery from KCI and HP to assess BellSouth's claim. Ultimately at stake is the welfare of the people of Tennessee. Their welfare is best served by a thorough investigation which enables the Authority to make a fully-informed decision. BellSouth may not now expect the Authority to forego a thorough investigation because BellSouth cannot make KCI and HP participate in discovery. Unless BellSouth can ensure full cooperation in the discovery process from its contractor experts, the Authority should make a summary finding that BellSouth cannot demonstrate the reliability of the Georgia and Florida tests.

Respectfully submitted,

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By: Sylvia E. Anderson
Sylvia E. Anderson
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October 10, 2001

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Re: *Docket to Determine the Compliance of BellSouth Telecommunications Inc.'s
Operations Support Systems with State and Federal Regulations, Docket No.
01-00362 (Tennessee Regulatory Authority)*

Dear Counsel:

As I have previously advised in my correspondence dated September 24, 2001, Hewlett-Packard Company is not a party to the above-referenced matter; is not a subject of the Order Establishing Issues and Procedural Schedule entered on September 13, 2001, in the above-referenced matter; is not subject to discovery requirements set forth in Rule 1220-1-2-.11 of the Rules of the Tennessee Regulatory Authority; and is not properly served with any discovery request prepared with respect to the above-referenced matter.

Accordingly, Hewlett-Packard Company is in no way required to produce witnesses listed by, or otherwise respond to, the "List of Persons to be Deposed and Request for Additional Time for Depositions" filed by AT&T Communications of the South Central States, Inc., TCG MidSouth, Inc. and the Southeastern Competitive Carriers Association before the Tennessee Regulatory Authority. Further, the two Hewlett-Packard witnesses expressly named in such document, Parag Doshi and Whit Matteson, reside in Georgia and are not found within the jurisdiction of the Tennessee Regulatory Authority.

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A LIMITED LIABILITY PARTNERSHIP

Henry Walker, Esq.

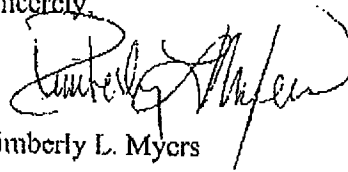
Sylvia E. Anderson, Esq.

October 10, 2001

Page 2

If you contend that Hewlett-Packard Company is subject to discovery in the above-referenced matter as a result of the documents that you have forwarded to this firm and to Hewlett-Packard Company's registered agent in Tennessee, please provide us with the basis for that contention.

Sincerely,

A handwritten signature in dark ink, appearing to read "Kimberly L. Myers", written over a horizontal line.

Kimberly L. Myers



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Law & Government Affairs
Vice President and General Attorney

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October 15, 2001

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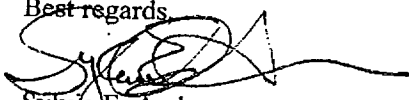
Dear Fred:

On September 27, 2001, AT&T and SECCA filed its List of Persons to be Deposed with the Tennessee Regulatory Authority ("TRA"). Subsequently, at the status conference on October 9, AT&T and SECCA narrowed that list. We would like to start scheduling those depositions. As discussed at the conference, there may be some depositions for which the North Carolina depositions may suffice. Since we will not know about those until after we receive testimony, we will not schedule those potential deponents yet.

We would like to go ahead and set-up the depositions of Saville, Wilson-Chu and Napier from BellSouth as well as some of the deponents from KPMG Consulting, Inc. ("KPMG"), Hewlett Packard Company ("HP"), PriceWaterHouse Coopers, LLP ("PWC"), and Cap Gemini Ernst and Young. Since BellSouth is relying upon work performed by those companies to establish its case, AT&T fully expects BellSouth to direct those companies to cooperate with discovery and assist in ensuring that those persons appear for their depositions. The TRA clearly expressed the same expectation of BellSouth at the status conference on October 9.

As you know the TRA has allowed us to start taking depositions now until November 19 for Phase I and now until rebuttal testimony is due for Phase II. I suggest that we work together informally along with the TRA staff to schedule the depositions. Please let me know the contact person at BellSouth to start the scheduling.

Best regards,



Sylvia E. Anderson

TN Docket No. 01-00362
Exhibit B



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October 18, 2001

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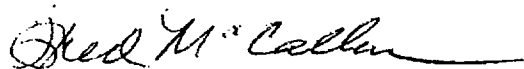
Dear Ms. Anderson:

Thank you for your letter of October 15, 2001. Lisa Foshee will be our primary contact person for scheduling the depositions of the BellSouth employees. Ms. Foshee is currently in the Florida PSC 271 hearing, and will be in other 271 hearings in Kentucky and North Carolina over the next several weeks. If AT&T could designate a contact lawyer who will be at those hearings to discuss scheduling with Ms. Foshee, they can discuss this next week at the Kentucky hearing.

As for the depositions of KPMG, HP and PWC, BellSouth has consistently cooperated with AT&T's efforts and have urged cooperation with AT&T's discovery requests. We will continue to do this. However, I would suggest that AT&T contact KPMG directly through their counsel, William Hill, or their in-house counsel, Jesse Fenner, in order to arrange for their depositions. This is how the scheduling of these depositions have been handled in other states. For HP, you should also contact them directly to arrange for that deposition. Finally, AT&T has already deposed Robert Lattimore for PWC. To the extent AT&T believes that further depositions of PWC are necessary, please let Lisa know and we can discuss this matter further. We will also coordinate with Cap Gemini to arrange the deposition.

Thank you.

Very truly yours,



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the following on this the 22nd day of October 2001.

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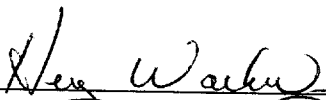
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